STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs **Supreme Court**
No. 150789

CHARLES JEROME DOUGLAS,

Defendant-Appellant.

Court of Appeals No. 315027
Trial Court No. 12-010051-FH

The People's Supplemental Brief pursuant to this Court's Order of October 30, 2015

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The People answer yes.
Defendant would answer no.

II. **Where a meritorious challenge, whether preserved or unpreserved, is made to the scoring of the offense variables of the sentencing guidelines, which changes the applicable guidelines range, but the defendant receives a sentence within the corrected range, has he suffered a deprivation of his substantial rights by virtue of the incorrect scoring alone, where there is no additional evidence (i.e. the sentence record) that there is a reasonable probability that without the scoring error, his minimum sentence would have been different, so that he should be entitled to some type of relief?**

The People answer no.
Defendant would answer yes.

III. **Even though the sentencing guidelines may now be advisory, after this Court's decision in *Lockridge*, plain error review is still available to offense variable scoring errors, just as it is in the federal system, whose guidelines have also been declared advisory. If a defendant prevails in this context under plain error review, there is no need for a separate ineffective assistance of counsel claim; if on the other hand, a defendant cannot prevail under plain error review, because he cannot show that a scoring error affected his substantial rights, he cannot prevail on a claim of ineffective assistance of counsel, because prejudice under the plain error test is the same as prejudice under *Pickens*/*Strickland.* Is there anything that warrants there being a separate claim of ineffective assistance of counsel available in addressing offense variable scoring errors?**

The People answer no.
Defendant would answer yes.

Statement of Facts

The People have no facts to add.

Argument

I. Where the minimum range of the guidelines calculation is not *enhanced* by the scoring of offense variables through judicial fact-finding, MCL 769.34(2) and (3) remain fully applicable to that sentence under MCL 8.5, and so, given that the minimum range here was not enhanced by judicial fact-finding, the guidelines remain mandatory, and pre-*Lockridge* precedent applies in this case.

A. Introduction

In its Order directing further briefing, this Court has directed that the parties address:

> whether *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), by rendering the sentencing guidelines advisory and/or by employing a remedy that does not mandate resentencing, affects
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> (1) whether a defendant can be afforded relief for an unpreserved meritorious challenge to the scoring of offense variables through a claim of ineffective assistance of counsel, see *People v Francisco*, 474 Mich 82, 89 n 8; 711 N.W.2d 44 (2006); and
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> (2) the scope of relief, if any, to which a defendant is entitled when the defendant raises a meritorious challenge to the scoring of an offense variable, whether preserved or unpreserved, and the error changes the applicable guidelines range, whether the defendant's sentence falls within the corrected range or not. See *id.* at 89-90; see also *People v Kimble*, 470 Mich 305, 310, 684 N.W.2d 669 (2004).[1]

But there is an assumption in this Court's predicate – that *Lockridge* "render[ed] the sentencing guidelines advisory" in cases where the guidelines range is not enhanced by judicial fact-finding – that is contrary both to *Lockridge* itself, [2] and to Michigan's severance statute, MCL 8.5.

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[1] *People v Douglas*, – Mich–; 870 NW2d 730 (2015).

[2] In *People v Terrell*, – Mich App –; – NW2d (2015), *lv to app pending* (Michigan Supreme Court Docket No. 152470), the Court of Appeals held that the guidelines are advisory even where the minimum range is not enhanced by judicial fact-finding. The People argue here,

Because no judicial fact-finding occurred here, the statutory scheme as written applies to this case. And, because counsel waived a challenge to the guidelines scoring,[3] review is for ineffective assistance, as was the case before *Lockridge* was decided. On the facts here, Defendant cannot prevail.

B. Where the minimum range of the guidelines calculation is not *enhanced* by the scoring of offense variables through judicial fact-finding, MCL 769.34(2) and (3) remain fully applicable to that sentence under MCL 8.5, and so, given that the minimum range here was not enhanced by judicial fact-finding, the guidelines remain mandatory, and pre-*Lockridge* precedent applies in this case.

It is critical here both to ascertain that which this Court held in *Lockridge*, and the manner in which MCL 8.5 applies. Startlingly, though announcing a severance, which the People believe, as will be explained, is limited both in the Opinion and necessarily by application of MCL 8.5, this Court in its Opinion never mentioned the severance statute at all. But the severance statute *must* be applied when severance of a portion of a statute is involved.

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as they argue in their Application pending before this Court, that the Court of Appeals is mistaken.

[3] Though discussed in the context of review for plain error in the Court of Appeals, this is actually not a case of issue forfeiture, but waiver. Indeed, at sentencing, counsel said, "We would ask the Court to consider sentencing him at the low end of the guidelines, which the Prosecutor and I, we agree that the minimum range would be seven months." (Sentence Transcript, 5). Any claim of error is thus extinguished, *People v Carter*, 462 Mich 206; 215-220; 612 NW2d 144 (2000), and review is for ineffective assistance of counsel. See e.g. *People v Marshall*, 298 Mich App 607, 616; 830 NW2d 414 (2012), *judgment vacated in part, appeal denied in part* 493 Mich 1020; 829 NW2d 876 (2013) ("A waiver extinguishes any error, leaving no error to review. . . . Accordingly, our review is confined to determining whether defense counsel was ineffective because he approved the admission of this evidence"). The prejudice requirements of either test cannot be met here.

i) This Court in *Lockridge* found the Michigan guidelines system deficient to "*the extent to which* the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily increase the floor of the guidelines minimum sentence range*, i.e. the 'mandatory minimum' sentence under *Alleyne*."[4]

This Court did not in *Lockridge* hold that judicial fact-finding in sentencing is unconstitutional; indeed, *Alleyne*[5] itself disclaimed any such holding. Rather, it is only when a mandatory minimum sentence – and this Court found the minimum range of the guidelines calculated under the Michigan statutory scheme to constitute a "mandatory minimum" under *Alleyne* – is *enhanced* by judicial fact-finding, *and* is *mandatory*, that the right to jury trial has been compromised. Thus, this Court's holding that the constitutional deficiency of the Michigan system is only to "*the extent to which* the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily increase the floor of the guidelines minimum sentence range*, i.e. the 'mandatory minimum.'" This Court's limited holding is demonstrated by its repeated use of the phrase "to the extent that" in discussing the constitutional deficiency it identified, limiting its holding to those situations where the guidelines range is *enhanced* by judicial fact-finding, the Court concluding that under the statutory scheme the minimum range is mandatory. If, then, the minimum range is *not* enhanced by judicial fact-finding, there is no constitutional error in the mandatory nature of the guidelines for that sentence.

To again illustrate this point, this Court said:

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[4] *People v Lockridge*, 498 Mich 358, 364; 870 NW2d 502 (2015) (emphasis supplied). In discussing the "constitutional error" identified by this Court in *Lockridge*, the People do not here concede that there *is* in fact a constitutional defect in the Michigan guidelines.

[5] *Alleyne v United State*s, 570 US –; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

> From *Apprendi* and its progeny, including *Alleyne*, we believe *the following test provides the proper inquiry* for whether a scheme of mandatory minimum sentencing violates the Sixth Amendment: Does that scheme constrain the discretion of the sentencing court by *compelling an increase in the mandatory minimum sentence beyond that authorized by the jury's verdict alone*? Michigan's sentencing guidelines do so *to the extent that* the floor of the guidelines range compels a trial judge to impose a mandatory minimum sentence beyond that authorized by the jury verdict. Stated differently, *to the extent* that OVs scored on the basis of facts not admitted by the defendant or necessarily found by the jury *verdict increase the floor of the guidelines range*, i.e. the defendant's "mandatory minimum" sentence, that procedure violates the Sixth Amendment.[6]

The mandatory nature of the guidelines scheme, then, is only unconstitutional, as this Court repeatedly said, "to the extent that" a minimum guidelines range is *enhanced* by judicial fact-finding. If a particular sentence is *not* so enhanced, then the statutory requirement that the sentence be within that range absent a statement of proper substantial and compelling reasons is perfectly constitutional.

ii) This Court in *Lockridge* only severed the mandatory requirements of MCL 769.34(2) and (3) "*to the extent that* [they] make[] the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory."[7]

Where the guidelines range is scored in a particular case with an offense variable or variables (OV) found by judicial fact-finding, and the scoring of an OV by judicial fact-finding enhances the guidelines range, then under this Court's holding in *Lockridge* the statutory requirement that the

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[6] *Lockridge*, 498 Mich at 373-374 (emphasis supplied).

[7] "To remedy the constitutional violation, we sever MCL 769.34(2) *to the extent that* it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory." *Lockridge*, 498 Mich at 364 (emphasis supplied). On its face, this is a limited severance, announced at the beginning of this Court's opinion.

sentence be within that range absent a justification for departure of substantial and compelling reasons is unconstitutional. But where there is no such enhancement by judicial fact-finding, either because there is no OV scored by judicial fact-finding, or because the scoring of an OV by judicial fact-finding does not enhance the range, then application of the statutory requirements is not unconstitutional. Thus the limited nature of this Court's remedy; the mandatory requirements in the statutory scheme are severed, said this Court, "to the extent that [they] make[] the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory." Again, use of the phrase "to the extent that" is a limitation on this Court's remedy for the constitutional deficiency it identified, limiting that remedy to curing the deficiency identified. But for situations outside the "extent that" – namely where the minimum range is *not* enhanced by judicial fact-finding – the statutory scheme is constitutional and remains applicable.

Though this limited severance cures the constitutional error, and though this Court said that it was severing the mandatory requirements "to the extent that" they make the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory, in other places of the opinion this Court used language that might be taken as suggesting that its severance remedy is to be applied even to situations where no constitutional error is occasioned by use of the statutory scheme as passed by the legislature; that is, where there is no enhancement of the minimum range by judicial fact-finding.[8] This Court should

[8] "[W]e sever MCL 769.34(2) to the extent that it is mandatory and strike down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." *Lockridge*, 498 Mich at 391.

affirm that the severance it has directed applies only "to the extent that" the statutory scheme makes mandatory the minimum sentence range *when that range is enhanced by judicial fact-finding*.

iii) MCL 8.5 *requires* that the severance remedy imposed by this Court be limited to those situations where the minimum range of the guidelines is enhanced by judicial fact-finding.

Though the legislature has directed the manner in which severance of provisions of statutes is to occur when a portion or application of a statutory scheme is held unconstitutional, neither this Court in *Lockridge*, nor the Court of Appeals in the *Terrell* opinion, made any mention *whatever* of the statutory requirements. MCL 8.5 provides:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with *the manifest intent of the legislature*, that is to say:
>
> If any portion of an act *or the application thereof* to any person or circumstances shall be found to be invalid by a court, such invalidity *shall not affect the remaining* portions or *applications* of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, *and to this end acts are declared to be severable*.[9]

It is quite plain that this Court has found that certain applications of the statutory scheme in MCL 769.34(2) and (3) are unconstitutional; that is, where they are applied to guidelines minimum ranges that are enhanced by judicial fact-finding. It is equally plain that where the guidelines minimum range is *not* enhanced by judicial fact-finding, application of MCL 769.34(2) and (3) to the sentence process is *not* unconstitutional under *Lockridge*. Further, after severing the application of these provisions from those situations where this Court has determined their application is

[9] MCL 8.5 (emphasis supplied).

unconstitutional, the "remaining portion" of the scheme, that is, its application to sentences where the minimum range is not enhanced by judicial fact-finding, is certainly "operable." And so, the legislature, having declared that where a statutory scheme has been declared unconstitutional as to certain applications that invalidity is not to affect the remaining applications of the act which can be given effect, this Court's severance in *Lockridge* is necessarily limited, as this Court said, "to the extent that" the statutory scheme applies to minimum sentence ranges that are enhanced by judicial fact-finding.

To be sure, this leaves a statutory scheme other than that enacted by the legislature, where the mandatory nature of the minimum range continues to apply to sentences not enhanced by judicial fact-finding, but not to sentences enhanced by judicial fact-finding, the latter being unconstrained, subject only to review for "reasonableness." That this is so cannot avoid the legislature's direction in the severance statute. Of course, *whenever* a statutory scheme is found invalid as to some applications but not others, the statutory scheme as then applied is not that enacted by the legislature – but the legislature has directed what is to be done in this situation; that is, the scheme is to be applied where it can be given effect without the invalid application. To avoid limited severance on this ground is to render MCL 8.5 a nullity. Here, the remaining "two-tiered" system is the result of this Court's opinion in *Lockridge* and faithful application of MCL 8.5; if the legislature is of the mind that in this situation it wishes something else, it is for the legislature to so say.

It may be argued that in *Booker*[10] itself the United States Supreme Court recognized that declaring the federal guidelines advisory only would apply to situations where mandatory application

[10] *United States v Booker*, 543 US 220, 233; 125 S Ct 738, 749-750; 160 L Ed 2d 621 (2005).

of the guidelines worked no constitutional wrong, yet the Court made the guidelines advisory in all circumstances nonetheless (over dissenting views). But there *is no federal severance statute*, and so the Court was free to make its "best guess" as to what Congress would have it do with the statutory scheme after the Court's declaration that its application in some situations was unconstitutional. This Court, to the contrary, is *not* free to take its best guess, but must faithfully apply MCL 8.5.

It might also be said that this Court may make its best guess as to the will of the legislature because MCL 8.5 says that its provisions do not apply where severance only to invalid applications of the statutory scheme "would be inconsistent with *the manifest*[11] *intent of the legislature*." Again, this Court is not free to guess at the legislature's intent in this regard, that is, whether the legislature wishes *not* to have the severance statute apply; rather, that intent must be made *manifest* by the legislature, and the legislature has not done so here. And the legislature knows how to make its intent manifest when it so desires:

> Pursuant to section 8 of article 3 of the state constitution of 1963, it is the intent of the legislature to request by concurrent resolution the opinion of the supreme court as to the constitutionality of this 1976 amendatory act as amended. Notwithstanding section 5 of chapter 1 of the Revised Statutes of 1846, being section 8.5 of the Michigan Compiled Laws, if the supreme court's advisory opinion finds any portion of this act, as amended, to be invalid, *the entire act shall be invalid*.[12]

* * * *

[11] "Manifest" means, in this context, "easily understood or recognized." Merriam-Webster Dictionary.

[12] MCL 830.425 (emphasis supplied).

> Enacting section 1. If any portion of this amendatory act or the application of this amendatory act to any person or circumstances is found invalid by a court, it *is the intent of the legislature that the provisions of this amendatory act are nonseverable* and that the *remainder of the amendatory act shall be invalid, inoperable, and without effect*.[13]

And, after all, applying the statutory scheme as written to *some* applications – where the guidelines range is not enhanced by judicial fact-finding – is closer to the legislative intent than applying the statutory scheme as written to *no* applications.

Faithful application of MCL 8.5 requires that severance here be limited, as this Court said in *Lockridge*, "*to the extent that*" application of the guidelines in a particular case would result in a minimum range enhanced by judicial fact-finding. Because the guidelines were not enhanced by judicial fact-finding – there has never even been such a claim in this case – pre-*Lockridge* precedent applies. Defendant waived the claim of scoring error, and on the facts here, it cannot be shown that counsel was ineffective.

C. A claim of ineffective assistance of counsel is not made out here, inasmuch as Defendant suffered no prejudice.

It is unnecessary to examine the nature of counsel's error in agreeing to the scoring of the guidelines here, for Defendant cannot possibly meet the prejudice prong of *Strickland*.[14] [15]

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[13] PA 52, 2007, MCL § 168.615c (emphasis supplied) found later unconstitutional.

[14] *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), adopted by this Court in *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

[15] Indeed, *Strickland* provides as follows:

(footnote continued on following page)

Defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[16] Defendant's guidelines were 7-46 months as scored, and removing the points for OV 13 results in a range with the same maximum, and a minimum that reduces by only 2 months. Defendant was also receiving a sentence of 5 years for felony-firearm second. The trial judge sentenced Defendant to 24 months to 10 years on the remaining convictions. As the Court of Appeals said, "Defendant cannot establish that the trial court's unpreserved scoring error resulted in prejudice or otherwise affected his substantial rights. Defendant received a minimum sentence of 24 months – well within the correct minimum sentence range of 5 to 46 months. Moreover, there is no indication that the trial

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> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.
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> *Strickland*, *supra*, 466 US at 697; 104 S Ct at 2069.

[16] *Strickland*, 466 US at 694; 104 S Ct at 2068.

court would have imposed a shorter minimum sentence had the guidelines been scored correctly."[17] The bar for ineffective assistance is high, and Defendant cannot meet it.

Because the People believe that the guidelines are mandatory in this case,[18] the People believe that this Court's questions, which assume they are advisory, become advisory or hypothetical questions; further, this Court's second question concerns, in part, preserved challenges, and this case does not present a preserved challenge. But because this Court has directed that supplemental briefs be filed addressing them, the People attempt to answer whether, where the guidelines *are* advisory under *Lockridge*, their now advisory nature makes any difference to previous precedent on review of and relief from scoring errors.

[17] *People v Douglas*, unpublished opinion per curiam of the Court of Appeals, decided August 7, 2014 (Docket No. 315027); 2014 WL 3887175, at 4 (2014).

[18] OV 13 was scored in this case, and is an "offense" variable. But its scoring only concerns convictions of a certain sort within a certain period, and requires identification of the appropriate convictions and placement of them within the relevant statutory period, but this is hardly "judicial fact-finding," and has not been claimed to be by Defendant.

II. Where a meritorious challenge, whether preserved or unpreserved, is made to the scoring of the offense variables of the sentencing guidelines, which changes the applicable guidelines range, but the defendant receives a sentence within the corrected range, he has not suffered a deprivation of his substantial rights by virtue of the incorrect scoring alone, unless he can point to additional evidence (i.e. the sentence record) that there is a reasonable probability that without the scoring error, his minimum sentence would have been different, so that he should not be entitled to any relief.

This Court's Inquiries

As noted in the previous Argument, this Court has directed the parties to file supplemental briefs in this case addressing

> whether *People v Lockridge*, 498 Mich 358 (2015), by rendering the sentencing guidelines advisory and/or by employing a remedy that does not mandate resentencing, affects (1) whether a defendant can be afforded relief for an unpreserved meritorious challenge to the scoring of offense variables through a claim of ineffective assistance of counsel, see *People v Francisco*, 474 Mich 82, 89 n 8 (2006); and (2) the scope of relief, if any, to which a defendant is entitled when the defendant raises a meritorious challenge to the scoring of an offense variable, whether preserved or unpreserved, and the error changes the applicable guidelines range, whether the defendant's sentence falls within the corrected range or not. See id. at 89-90; see also *People v Kimble*, 470 Mich 305, 310 (2004).

The People find it easier to address this Court's second inquiry first inasmuch as the People believe that addressing inquiry (2) is a natural progression to addressing inquiry (1). With this Court's indulgence, then, the People will first address inquiry (2).

> **(2) the scope of relief, if any, to which a defendant is entitled when the defendant raises a meritorious challenge to the scoring of an offense variable, whether preserved or unpreserved, and the error changes the applicable guidelines range, whether the defendant's sentence falls within the corrected range or not**

In fashioning a remedy in the situation where the sentencing judge engages in judicial fact-finding, this Court followed the remedy adopted by the United States Supreme Court in *Booker*.[19] As noted in the previous Argument, the Court in *Booker* declared the guidelines advisory across the board, that is advisory in all circumstances, which as the People have argued in Argument I, is not the situation in Michigan under the *Lockridge* decision. Nevertheless, this Court's hypothetical inquiries presupposes that the Michigan guidelines are advisory, so the People will address this Court's hypothetical inquiries under that supposition.

First, there is no question that the sentencing guidelines have significance. Indeed, as this Court stated in *Lockridge*,[20] "[s]entencing courts must, however, continue to consult the applicable guidelines range [even though they are advisory] and take it into account when imposing a sentence." The United States Supreme Court has expressed the same sentiment, "[a]s we explained in *Rita*, a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. (Citation omitted). As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."[21]

If Michigan's sentencing guidelines do have significance, the People believe that it would be a mistake to argue that an issue as to the scoring of them is not cognizable on appeal.[22] Indeed, scoring errors in the federal courts are cognizable on appeal, as evidenced by the fact that a trial

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[19] *Lockridge, supra*, 498 Mich at 391, citing *Booker, supra*, 543 US at 246; 128 S Ct at 757.

[20] 498 Mich at 392.

[21] *Gall v United States*, 552 US 38, 49; 128 S Ct 586, 596; 169 L Ed 2d 445 (2007).

[22] See e.g. *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997).

court's sentencing decision is reviewed first for significant procedural error, such as failing to calculate or improperly calculating the guidelines range.[23] And then, assuming that the trial court's sentencing decision is procedurally sound, the appellate court then considers the substantive reasonableness of the sentence imposed under the abuse of discretion standard.[24] And this is the scope of review even though the federal guidelines are advisory.

Because there is an obvious parallelism between the federal system and this Court's hypothetical supposition that the guidelines are advisory across the board, this Court can look to the federal courts for guidance relative to the inquiries posed in its Order.

a) Where there is an unpreserved meritorious challenge to the scoring of an offense variable, what is the scope of relief?

An unpreserved meritorious challenge to the scoring of an offense variable, like any other unpreserved claim of error, triggers the plain error standard of review.[25] Under the plain error standard, the defendant has the burden of showing: 1) that error occurred, 2) that the error was plain, i.e., clear or obvious, 3) and that the plain error affected substantial rights; this generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. Furthermore, once a defendant satisfies these three requirements, an appellate court must still exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant, or when the error

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[23] *Gall, supra*, 552 US at 51; 128 S Ct at 597.

[24] *Gall, supra*.

[25] *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence.

When a *Gall* procedural error, i.e. a miscalculation of the guidelines, is reviewed for plain error, the burden is on the defendant to demonstrate a reasonable probability that but for the error, the outcome would have been different.[26]

i) What happens if the misscoring changes the applicable guidelines range?

The Second Circuit has held that where there is a significant difference between the minimum range as misscored and the range as correctly scored, the third prong of the plain error test is satisfied.[27] That would stand to reason, although that is not the case here (even if this case was applicable, which it is not, because the scoring of the pertinent Offense Variable was not due to judicial fact-findings, which means that the guidelines in this case were mandatory), because the difference between the low-end of the minimum misscored range (7 to 46 months) and the low-end minimum correct range (5 to 46 months) was two months, and the sentencing court did not impose a minimum sentence at the very bottom the Guidelines, but rather, imposed a minimum sentence of 24 months, well above the low end. In other words, this is not a case where an argument could seriously be made that had the judge known that the correct range was 5 months instead of 7 months, he would have given Defendant a minimum sentence of 5 months, or even a minimum sentence of 22 months instead of the 24 month minimum that he did impose.

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[26] *United States v Ault,* 598 F3d 1039, 1042 (CA 8, 2009).

[27] *United States v Wernick,* 691 F3d 108, 117 (CA 2, 2012).

Of course, what is stated above, that the third prong of the plain error test is satisfied if there is a significant difference between the misscored minimum range and the correctly-scored minimum range presupposes that the defendant was given a minimum sentence under the miscored range that was significantly higher than a minimum sentence that he would have been given under a correctly scored minimum range. And that would still only apply, it seems, in the situation where the defendant's minimum sentence was near the low-end of the misscored range, suggesting that he may then have been at the low-end of a correctly-scored minimum range. Whether this would be the case or not would depend to a great extent on what the sentencing judge said at the time of sentencing.

Just to complete the plain error analysis, the Second Circuit says that a scoring error that significantly changes the guidelines range meets the fourth prong of plain error review:

> We are mindful that a remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does, (citations omitted), and this fact weighs in our assessment of the fourth prong, cf. *Williams*, 399 F.3d at 454–57 (discussing relative costs of plain error review for trial and sentencing errors). Given the dramatic impact on the Guidelines calculation, with the resulting possibility that the error resulted in the defendant's being imprisoned for a longer time, and the relatively low cost of correcting the miscalculation, we believe that failure to notice the error would adversely affect the public perception of the fairness of judicial proceedings. Having found plain error, we remand the case for resentencing. [28]

The Second Circuit's application of plain error review is consistent with the reasoning expressed in *Kimble*.[29]

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[28] *Wernick, supra*, 691 F3d at 117-118.

[29] 470 Mich at 312-313.

a) What happens if the misscoring changes the applicable guidelines range, but the sentence falls within the corrected range?

This Court's inquiry hypothesizes a scenario where the error changes the applicable guidelines range, but the defendant's sentence falls within the corrected range, and asks if the defendant should be entitled to any relief.

This is a scenario that the federal courts have addressed, and they are split. The federal courts call this an "overlap," that is where the sentence imposed falls into the "overlap" between the incorrect guidelines range used by the sentencing court and the correct guidelines range.[30] The Third Circuit, as well as a number of other Circuits, have said that this does not make the scoring error harmless even under plain error review:

> The government contends that a sentencing error is also harmless where, as here, the sentence imposed falls into the "overlap" between the incorrect Guidelines range used by the sentencing court and the correct Guidelines range. Although some courts have adopted an "overlapping range" rationale, we conclude that such an "overlap" does not necessarily render an error in the Guidelines calculation harmless. Such an overlap, alone, proves too little. The record must show that the sentencing judge would have imposed the same sentence under a correct Guidelines range, that is, that the sentencing Guidelines range did not affect the sentence actually imposed. The overlap may be helpful, but it is the sentencing judge's reasoning, not the overlap alone, that will be determinative. [fn3] [31]

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[30] *United States v Langford*, 516 F3d 205, 216 (CA 3, 2008).

[31] This is what the footnote (footnote 3) says:

> See *United States v Harris*, 390 F3d 572, 573 (CA 8, 2004) (concluding that, based on the record from sentencing, it was clear that the district court would have imposed the same sentence and noting that had the overlap been at the bottom of the overlapping area, "there might be an inference that the court would have given [the defendant] a lower sentence if he had received a [smaller] adjustment"); *United States v Rivera*, 22 F3d 430, 439 (Ca 2, 1994) (holding that

(Footnote continued on next page)

> In *United States v Knight*, we made clear that we do not agree that an overlap between ranges renders an error harmless. 266 F3d 203 (CA 3, 2001). In *Knight*, the District Court erroneously calculated the Guidelines range as 151 to 188 months and imposed a 162-month sentence that fell within the correct Guidelines range of 140 to 175 months. *Id*. at 205. Under the exacting plain error standard, we held that "application of an incorrect Federal Sentencing Guidelines range presumptively affects substantial rights, even if it results in a sentence that is also within the correct range." *Id*.; see also *United States v Wood*, 486 F3d 781, 790-791 (CA 3, 2007) (relying on *Knight* post-*Booker* and vacating and remanding); *United States v Felton*, 55 F3d 861, 869 n 3 (CA 3, 1995) ("This circuit and others have found that the miscalculation of a defendant's offense level 'certainly is error that seriously affect[s] the defendant's rights, and so amounts to plain error.' ") (citation omitted); *United States v Pollen*, 978 F2d 78, 90 (3d Cir.1992) ("The district court's improper calculation ..., resulting in a significantly higher Guideline sentencing range, certainly is an error that seriously affected [defendant]'s substantial rights and so amounts to plain error."). We reviewed numerous cases wherein our sister courts of appeals similarly concluded that the selection of an incorrect Guidelines range was plain error even though the actual sentence happened to fall within the correct Guidelines range. *Id*. at 208-210. Recognizing that some cases had been to the contrary, we decided that our case law was more sound in that it better protects the defendant's right to a sentence "imposed pursuant to correctly applied law" and "better effectuates the Guidelines' purpose to institute fair and uniform sentencing." *Id*. at 210. We reviewed the record and determined that "we would be unable to conclude that it is even reasonably likely that the same sentence would have been imposed if the correct range and history were considered." *Id*. at 208.[32]

The *Langford* case did have a strong dissent, however, with the salient points worth setting out:

> where there was an overlap in the sentence the defendant advocated and the range used by the court (which in any case the court of appeals believed to be correct) and the sentencing court made clear that it would have imposed the same sentence regardless of the range, the error was harmless); cf. *United States v Dillon*, 905 F2d 1034, 1037–38 (CA 7, 1990) (speculating that because the correct Guidelines range and that used overlapped, the sentencing judge would have imposed a sentence at the high end under the correct range because of other factors the judge had properly considered, even though the sentence was in the middle of the range actually used).

[32] *Langford, supra*, 516 F3d at 215.

Rita, *Gall*, and *Kimbrough* show that appellate review hinges on the reasonableness of the ultimate sentence as based on the total § 3553(a) analysis, rather than on the calculation of the Guidelines range. The reasonableness of a sentence will not be vitiated by an "insignificant" error in the Guidelines calculation. The Guidelines computation should be performed carefully, but it is designed to produce a range – not a designated point. Consequently, the Guidelines calculation need not be as precise as an engineering drawing.

There is enough play in the system to allow for harmless error. Although a sentence may be unreasonable if a district court makes clearly erroneous factual findings when determining the Guidelines range, the doctrines of plain error or harmless error can apply to preserve the sentence imposed. See *Jimenez*, 513 F3d at 84-85 (citing *United States v Grier*, 475 F3d 556, 570 (CA 3, 2007)); see also *Booker*, 543 US at 268; 125 S Ct 738 (stating that appellate courts reviewing sentences should "apply ordinary prudential doctrines" such as waiver, plain error, and harmless error).

If the computations, even if erroneous, lead the district judge to consider a reasonable range of sentences that is not a marked deviation from the national estimate provided by the correct Guidelines range, they have fulfilled their proper role of promoting national uniformity. They have also played a role that satisfies § 3553(a)(4)'s requirement that the sentencing court review "the kinds of sentence and the sentencing range" for the offense. The Supreme Court confirmed that appellate courts can continue to require a strong showing to sustain a final sentence that is imposed outside the Guidelines range, *Gall*, 128 S Ct at 597, but that justification can be supplied by the strength of the reasoning in the court's discussion of the § 3553(a) factors. In its final ruling, the District Court's proper use of all the § 3553 factors to reach the ultimate sentence can make insignificant its errors in the Guidelines calculation.

This case presents a situation where an insignificant miscalculation in the Guidelines computation did not result in an unreasonable sentence. The sentence was not simply within the zone of reasonableness around the proper Guidelines range, but was in fact within that range itself, albeit at its extreme. See *Rita*, 127 S Ct at 2463 (noting that a judge's choice of a sentence within the Guidelines range means that his judgment accords with that of the Sentencing Commission and "increases the likelihood that the sentence is a reasonable one."); see also *United States v Cooper*, 437 F3d 324, 332 (CA 3, 2006) ("A sentence that falls within the guidelines range is more likely to be reasonable than one outside the guidelines range.").[33]

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[33] 516 F3d at 224.

The Fifth Circuit, on the other hand, follows the"overlap" harmless error rationale:

> Put simply, where the resulting sentence falls within both the correct and incorrect guidelines, we do not assume, in the absence of additional evidence, that the sentence affects a defendant's substantial rights." *Blocker*, 612 F3d at 416. We have consistently refused to find plain error simply based on an incorrect guidelines range when the correct and incorrect ranges overlap and the sentence imposed falls within both sentencing ranges. See, e.g., *Salas-Sanchez*, 400 Fed Appx at 869 (collecting cases with overlapping guidelines ranges, including cases involving only one-month overlap); *Campo-Ramirez*, 379 Fed Appx. at 408 (collecting cases with overlapping guidelines ranges and noting that *Price* stands alone); see also *United States v Cruz-Meza*, 310 Fed Appx 634, 636-637 (CA 5), *cert denied*, – US –; 130 S Ct 86; 175 L Ed 2d 59 (2009) (finding that one-month overlap demonstrates "only a possibility of a lesser sentence but for the error, not the requisite probability "). In these cases, mathematics alone does not provide the requisite probability of a lesser sentence.[34] [35]

The People submit that the Fifth Circuit's view, which is, admittedly the minority view, is more consistent with Michigan precedent that places the burden of showing true outcome-

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[34] *United States v Wesevich*, 414 Fed Appx 620, 621-622 (CA 5, 2011).

[35] It appears that the "overlap" question with regards to plain error, that is whether a defendant, sentenced within the overlap, where the incorrect and correct guidelines overlap, must, in order to show plain error, demonstrate "additional evidence," such as remarks of the judge at the time of imposition of sentence, that the error affected his substantial rights:

> The Supreme Court recently granted certiorari the [to] review this court's standard for assessing the "substantial rights" requirement of plain error review. See *United States v Molina–Martinez*, 588 Fed Appx 333 (CA 5, 2015), cert granted – – US –; 136 S Ct 26; – L Ed 2d – (2015). But that case involves this court's more stringent standard for demonstrating that an error affected the defendant's substantial rights when the defendant was sentenced within the overlap between the incorrect and correct Guidelines ranges.
>
> *United States v Putnam*, No. 14-51238; 2015 WL 7694538, at *3, fn 2 (CA 5, November 25, 2015).

determinative error on the defendant (even where a claim of an alleged error has been preserved, as will be discussed in the next section). Simply put, a reviewing court should show considerable reluctance in finding a reasonable probability that the trial court would have settled on a lower sentence when the defendant's sentence falls within both the correct and incorrect guidelines ranges. The Fifth Circuit also provides a good workable definition of plain error review in the context of guidelines scoring miscalculations:

> To show reversible plain error, [a defendant] must show a clear or obvious error that affects his substantial rights. *Puckett v United States*, 556 US 129, 135; 129 S Ct 1423; 173 L Ed 2d 266 (2009). If he makes that showing, we have discretion to correct the error but only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings.
>
> * * * *
>
> In order to establish that his substantial rights were affected by this error, [the defendant] must "show a reasonable probability that, but for the district court's misapplication of the Guidelines, he would have received a lesser sentence." *United States v Villegas*, 404 F3d 355, 364 (CA 5, 2005) (per curiam). "[A]bsent additional evidence, a defendant has shown a reasonable probability that he would have received a lesser sentence when (1) the district court mistakenly calculates the wrong Guidelines range, (2) the incorrect range is significantly higher than the true Guidelines range, and (3) the defendant is sentenced within the incorrect range." *United States v Mudekunye*, 646 F3d 281, 289 (CA 5, 2011) (per curiam) (citations omitted).
>
> In *Mudekunye*, we held that in cases where the correct and incorrect Guidelines ranges overlap, but the court imposes a sentence significantly above the top-end of the correct Guidelines range, the imposed sentence affects the defendant's substantial rights "where it is not apparent from the record that [the defendant] would have received an above-Guidelines sentence." 646 F3d at 290 (quoting *United States v John*, 597 F3d 263, 285 (5th Cir.2010)).[36]

[36] *United States v Hernandez*, 690 F3d 613, 620-621 (CA 5, 2012).

b) Where there is a preserved meritorious challenge to the scoring of an offense variable, what is the scope of relief?

It seems that whatever the result would be under plain error review would be the same in Michigan where the scoring error is preserved. This is so because a scoring error is nonconstitutional error which triggers an analysis under *People v Lukity*,[37] which places the burden of demonstrating that it is more probable than not that a preserved nonconstitutional error was outcome determinative, i.e. that it resulted in a miscarriage of justice.[38] [39]

So, if this Court follows the Fifth Circuit's "overlap" view, the defendant would not get any relief for a scoring error, even when a scoring error claim is preserved, where the error changes the applicable guidelines range, but the defendant's sentence falls within the corrected range.

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[37] 460 Mich 484; 596 NW2d 607 (1999).

[38] 460 Mich at 492-496.

[39] Some Federal Circuits place the burden on the beneficiary of the error:

> According to our traditional harmless error standard, a non-constitutional error is harmless when "it is highly probable that the error did not prejudice" the defendant. * * * * " 'High probability' requires that the court possess a 'sure conviction that the error did not prejudice' the defendant." * * * * As the Supreme Court has instructed, the proponent of the sentence bears the burden of "persuad[ing] the court of appeals that the district court would have imposed the same sentence absent the erroneous factor." *Williams v United States*, 503 US 193, 203; 112 S Ct 1112; 117 L Ed 2d 341 (1992). For the error to be harmless, it must be clear that the error did not affect the district court's selection of the sentence imposed. *Id*. at 203; 112 S Ct 1112. Accordingly, we will remand for resentencing "unless [we] conclude on the record as a whole ... that the error did not affect the district court's selection of the sentence imposed.
>
> We submit that the improper calculation of the Guidelines range can rarely be shown not to affect the sentence imposed.
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> *Langford, supra*, 516 F3d at 215.

III. Even though the sentencing guidelines may now be advisory, after this Court's decision in *Lockridge*, plain error review is still available to offense variable scoring errors, just as it is in the federal system, whose guidelines have also been declared advisory. If a defendant prevails in this context under plain error review, there is no need for a separate ineffective assistance of counsel claim; if on the other hand, a defendant cannot prevail under plain error review, because he cannot show that a scoring error affected his substantial rights, he cannot prevail on a claim of ineffective assistance of counsel, because prejudice under the plain error test is the same as prejudice under *Pickens*/*Strickland*. Accordingly, nothing warrants there being a separate claim of ineffective assistance of counsel available in addressing offense variable scoring errors.

This Court's other inquiry in its Order of October 20, 2015, which is actually its first inquiry is:

> **(1) whether a defendant can be afforded relief for an unpreserved meritorious challenge to the scoring of offense variables through a claim of ineffective assistance of counsel**

Even though the Federal Sentencing Guidelines have been made advisory, and this Court's Order presupposes that *Lockridge* made the sentencing guidelines advisory across the board, every federal circuit appears to be legion in applying the plain error standard of review to an unpreserved miscalculation of the Federal Guidelines.

If Michigan is going to follow what the federal courts do, and apply the plain error standard of review, even though the guidelines are advisory (again, this Court's hypothetical presupposes that post-*Lockridge*, the guidelines are advisory across the board), there seems to be no purpose in there being available a separate claim of ineffective assistance of counsel, where counsel does not object to a particular offense variable scoring error, because if the defendant gets relief by an application of the plain error test, he has gotten what he asked for. If, on the other hand, the reviewing court finds that the defendant's substantial rights have not been affected (the third prong of the plain error

test), he has not shown prejudice, because prejudice under the plain error test is the same as prejudice under *Pickens*/*Strickland*.[40]

As the Eighth Circuit has noted, the standard for prejudice under *Strickland* is virtually identical to the showing required to establish that a defendant's substantial rights were affected under plain error analysis.[41] In both instances, the party challenging a conviction must show a reasonable probability that absent the alleged error, the outcome of the proceeding would have been different.[42]

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[40] *Pickens, supra*; *Strickland,* supra..

[41] *Becht v United States,* 403 F3d 541, 549 (CA 8, 2005).

[42] *Id.* See also *United States v Saro,* 306 US App DC 277, 281; 24 F3d 283, 287 (CA DC, 1994) ("Since reversal for 'plain error' is designed largely to protect defendants from the defaults of counsel, there is a natural analogy between the assertion of 'plain error' and the assertion of ineffective assistance of counsel. It should come as no surprise, then, that the *Strickland* formulation of 'prejudice' comes quite close to what we have required in plain-error cases."); but see *United States v Caputo,* 978 F2d 972, 975 (CA 7, 1992) (suggesting that ineffective-assistance claims require stronger showing of prejudice); *Gordon v United States,* 518 F3d 1291, 1298 (CA 11, 2008):

> When a claim of ineffective assistance is based on a failure to object to an error committed by the district court, that underlying error must at least satisfy the standard for prejudice that we employ in our review for plain error. Compare *United States v Underwood,* 446 F3d 1340, 1343-1344 (CA 11, 2006) (third part of plain error analysis required defendant to establish "a reasonable probability of a different result" at sentencing), with *Gilliam v Sec'y Dep't of Corr,* 480 F3d 1027, 1033 (CA 11, 2007) (prejudice standard of *Strickland* requires that there be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (internal quotation marks omitted)). See also *United States v Nash,* 438 F3d 1302, 1304 (CA 11, 2006). The failure to object to a single error that is either unobvious or nonprejudicial does not "stamp [counsel's] overall performance with a mark of ineffectiveness." *Chatom* [*v White*], 858 F2d [1479] at 1485. It would be nonsensical if a petitioner, on collateral review, could subject his challenge of an unobjected-to error to a lesser burden by articulating it as a claim of ineffective assistance. Cf. *United States v Caputo,* 978 F2d 972, 975 (CA 7, 1992) (not every plain error rises to the level of an error that "leaps out at the reader" or "condemns the lawyer who failed to bring it to the judge's attention of professional incompetence").

The only scenario where a claim of ineffective assistance of counsel could possibly lie in this context would be where a defendant's trial counsel expressly agrees to a scoring that is clearly erroneous; that is, where there has been a waiver of the issue, which essentially extinguishes any error, and so, extinguishes substantive review of the error itself.[43]

[43] *Carter, supra*, 462 Mich at 214; and see e.g. *People v Hershey*, 303 Mich App 330, 349-354; 844 NW2d 127 (2013).

Relief

Wherefore, the People respectfully request that this Honorable Court deny Defendant's Application for Leave to Appeal.

Respectfully submitted,

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